

PCB 14

[05-Apr-1991]

PCB NO. 14

ENTRY ORDER

SUPREME COURT DOCKET NO. 91-178

JUNE TERM, 1991

In re William A. Hunter

Original Jurisdiction

FROM:
Professional Conduct Board

Docket No. 89.51

In the above entitled cause the Clerk will enter:

Pursuant to the recommendation of the Professional Conduct Board filed April 29, 1991, and approval thereof, it is hereby ordered that William A. Hunter, Esq., be publicly reprimanded for violation of DR 1-102(A) (4) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentations), DR 1-102(A) (5) (engaging in conduct prejudicial to the administration of justice) and DR 5-103(B) (advancing or guaranteeing financial assistance to a client). A.O. 9, Rule 8E.

BY THE COURT:

/s/

Frederic W. Allen, Chief Justice

/s/

Ernest W. Gibson III, Associate Justice

/s/

[x] Publish

John A. Dooley, Associate Justice

/s/

[] Do Not Publish

James L. Morse, Associate Justice

/s/

Denise R. Johnson, Associate Justice

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In the above entitled cause the Clerk will enter:

Pursuant to the recommendation of the Professional Conduct Board filed April 29, 1991, and approval thereof, it is hereby ordered that William A. Hunter, Esq., be publicly reprimanded for violation of DR 7-108 (communications with jurors). A.O. 9, Rule 8E.

BY THE COURT:

/s/

Frederic W. Allen, Chief Justice

/s/

Ernest W. Gibson III, Associate Justice

/s/

Publish

John A. Dooley, Associate Justice

/s/

Do Not Publish

James L. Morse, Associate Justice

/s/

Denise R. Johnson, Associate Justice

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STATE OF VERMONT

PROFESSIONAL CONDUCT BOARD

In re: William A. Hunter, Respondent

PCB File No. 89.51

FINAL REPORT AND RECOMMENDATION TO THE SUPREME COURT

Pursuant to A.O. 9, Rule 8E, the Professional Conduct Board hereby reports to the Supreme court its findings of fact, conclusions of law and recommended disposition.

The Board has reviewed the report of the hearing panel dated 1/11/91. The Board adopts the findings of fact and conclusions of law attached hereto.

The Board recommends to the Court that the following sanction be imposed: Public reprimand This sanction is recommended in light of the mitigating and aggravating circumstances set forth in the hearing panel report dated 1/11/91.

Said report is adopted by the Board without any modifications.

Dated at Montpelier, Vermont this 5th day of April, 1991.

/s/
J. Eric anderson, Esq.
Chairman

/s/
Christopher L. Davis, Esq.
Vice-Chairman

/s/
Anne K. Batten

/s/
Donald Marsh

Leslie G. Black, Esq.

/s/
Deborah S. McCoy, Esq.

/s/
Richard L. Brock, Esq.

/s/
Karen Miller, Esq.

/s/
Joseph F. Cahill, Jr., Esq.

Joel W. Page, Esq.

/s/
Nancy Corsones, Esq.

Edith Patenaude

/s/
Hamilton Davis

/s/
Edward Zuccaro, Esq.

Rosalyn L. Hunneman

STATE OF VERMONT

PROFESSIONAL CONDUCT BOARD

In re: William A. Hunter, Respondent
PCB File No. 89.65

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Dated at Montpelier, Vermont this 5th day of April, 1991.

/s/ J. Eric anderson, Esq. Chairman
/s/ Christopher L. Davis, Esq. Vice-Chairman

/s/ Anne K. Batten
/s/ Donald Marsh

/s/ Leslie G. Black, Esq.
/s/ Deborah S. McCoy, Esq.

/s/ Richard L. Brock, Esq.
/s/ Karen Miller, Esq.

/s/ Joseph F. Cahill, Jr., Esq.
/s/ Joel W. Page, Esq.

/s/ Nancy Corsones, Esq.
/s/ Edith Patenaude

/s/ Hamilton Davis
/s/ Edward Zuccaro, Esq.

/s/ Rosalyn L. Hunneman

Decision No. 14

STATE OF VERMONT

PROFESSIONAL CONDUCT BOARD

In re: William Hunter, Esq., Respondent
PCB File No. 89.51 & PCB File No. 89.65

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Professional Conduct Board has considered the findings of fact, conclusions of law, and recommendations of the hearing panel. The hearing panel recommended that a public reprimand be imposed as to PCB File 89.51 and that a suspension of 60 days be imposed as to PCB File 89.65.

Bar counsel, Respondent, and Respondent's counsel appeared before the board on January 11, 1991 pursuant to Rule 8D. At that time, Respondent and Bar Counsel presented a joint recommendation that a sanction no greater than public reprimand be imposed. Both cited policy reasons to support their recommendations including, among others, Respondent's lack of any previous disciplinary record, Respondent's cooperation with these disciplinary proceedings, and respondent's remorse and acceptance of responsibility for his misconduct. Further, the Board understands that Bar Counsel's recommendation of a sanction lesser than the sanction recommended by the hearing panel is premised in large part upon Respondent's representation that he waives all appellate rights before the Supreme Court. This waiver was made regardless of whether or not the Board or the Supreme Court accepts the joint recommendation of Bar Counsel and Respondent. Respondent has acknowledged to the Board his understanding that, regardless of the Board's actions in this matter, the Supreme Court is free to reach different conclusions of law and to impose a greater or lesser sanction.

With this background in mind, the Board adopts the findings of fact and conclusions of law of the hearing panel, which are set forth below. The Board also recommends to the Supreme Court that Respondent be publicly reprimanded for his misconduct in these two matters.

FINDINGS OF FACT AND CONCLUSIONS OF LAW
Count I - PCB File No. 89.51

1. Respondent is a 1984 graduate of Harvard Law School. As a condition of his admission to the Vermont Bar in 1985, he took and passed an examination in professional ethics. Respondent has engaged in a general practice of law with an emphasis in litigation.

2. At all times material hereto, respondent represented one Peter Straw Harris. Peter Harris purchased a truck from a customer of Kelley Chrysler- Plymouth-Dodge, Inc., an automobile dealership in Springfield, Vermont. When the transmission failed while the motor vehicle was under warrantee, Mr. Harris brought the truck to Kelley Chrysler-Plymouth-Dodge, Inc. for repair.

3 While the truck was under repair, Mr. Harris rented a replacement vehicle from Kelley Chrysler-Plymouth-Dodge, Inc. at a reduced rate for customers. Mr. Harris used the rental car for 15 days.

4. When the repairs were complete and Mr. Harris returned the replacement vehicle, he owed \$568.84 for the rental. Mr. Harris advised employees of Kelley Chrysler-Plymouth-Dodge, Inc. that he had no funds to pay for the rental and that he would return the next day to make payment. The dealership refused to release the truck until the rental bill was paid. Mr. Harris left, stating that he would call his lawyer.

5. Mr. Harris consulted by telephone with Respondent. Respondent then had a telephone conversation with Patrick Kelley who operates Kelley Chrysler- Plymouth-Dodge Inc. Respondent told Mr. Kelley that he had no right to retain the truck because no moneys were owed for its repair. However, Respondent proposed that if Mr. Kelley Paid one-half of the bill, Mr. Harris would pay the other half within 30 days.

6. Mr. Kelley expressed skepticism to Respondent that Mr. Harris

would pay for his half of the bill within 30 days. Respondent stated that his word was good and that he would personally guarantee payment for Mr. Harris.

7. Mr. Kelley asked Respondent if he would repeat that guarantee to Mr. Kelley's lawyer, Stephen Ankuda. Respondent stated that he would do so.

8. Mr. Kelley telephoned Mr. Ankuda and explained the situation to him. Mr. Ankuda then telephoned Respondent. Respondent told Mr. Ankuda he guaranteed to pay the debt if his client failed to do so. Mr. Ankuda expressed surprise at such a statement and asked Respondent if he was "crazy." Respondent assured Mr. Ankuda that payment would be made. Respondent clearly represented to Mr. Ankuda that Respondent was accepting personal liability for Mr. Harris' debt. Mr. Ankuda authorized Respondent to communicate directly with Mr. Kelley to settle this matter.

9. Based upon Respondent's representation to him, Mr. Ankuda called Mr. Kelley and confirmed that the statement regarding a personal guarantee of payment had been made.

10. Based upon Respondent's promise of payment, Mr. Kelley released the truck to Mr. Harris. Mr. Kelley would not have released the truck but for Respondent's specific guarantee.

11. Mr. Harris did not pay the balance of the debt.

12. Beginning in March, Mr. Kelley made repeated telephone calls to Respondent's office in an effort to collect the debt. Eventually, the receptionist in Respondent's office informed Mr. Kelley that Respondent could not speak to him directly because he was represented by counsel.

13. Mr. Ankuda then made several unsuccessful attempts to contact Respondent by telephone. His calls were not returned.

14. On April 7, 1989 Mr. Ankuda wrote to Respondent requesting that he pay the debt as promised. A copy of that letter is attached hereto as Exhibit 1. Mr. Ankuda specifically recounted the promise to pay the unsatisfied debt in this letter.

15. Respondent did not reply to Mr. Ankuda's letter nor did he make any attempt to deny to Mr. Ankuda that Respondent was personally liable for the debt of Mr. Harris. Respondent did attempt to get in touch with Mr. Harris by leaving messages for him.

16. In May, Mr. Kelley filed suit in small claims court against Mr. Harris to collect the entire sum of \$568.84. When Mr. Harris could not be served by mail, this suit was dismissed and Mr. Kelley filed suit against Respondent for collection of the debt.

17. Respondent answered the complaint by denying that he had ever promised payment of this debt and by asserting the Statute of Frauds.

18. Approximately one week before the case against Respondent was to be heard on the merits, Mr. Harris sent Mr. Kelley a check for \$284.42. Mr. Kelley then dropped his suit against Respondent.

19. Mr. Harris' check was returned for insufficient funds on December 6, 1989.

20. After Mr. Kelley reported the bad check to the police department, Respondent appeared at the police department and paid \$284.42 in cash.

21. Respondent continued to represent Mr. Harris after becoming personally involved in this dispute. Respondent attempted to bring pressure to bear on Mr. Harris to pay the debt by telling him that Mr. Harris' refusal to pay was now creating problems for Respondent.

22. Respondent asserted at the hearing that he did not promise to pay the debt of Mr. Harris or otherwise personally guarantee repayment. The panel found by clear and convincing evidence that Respondent did, in fact, make such a claim. The Board adopts this finding as its own. Respondent did concede that his statement to Mr. Kelley that Peter Harris would pay his half of the debt was a misrepresentation.

23. Accordingly, the Board finds that Respondent has violated the following disciplinary rules: DR 1-102(A)(4); DR 1-102(A)(5); and DR 5-103(B). The Board also finds that Respondent acted knowingly and that, as a result of Respondent's deceitful failure to abide by his promise, Mr. Kelley was damaged in loss of time and money.

Court II - PCB File No. 89.65

24. On November 6, 1989 at Windsor District Court, after a four day trial resulting in the acquittal of his client, Respondent conversed with several jurors as they left the courthouse, thanking them and shaking hands. Respondent told some of the jurors that, although they had not been advised of this, his client had been incarcerated throughout these proceedings.

25. These jurors were members of the panel that had just recently begun three months of jury service. At the time he spoke with the jurors, Respondent knew that he would continue to draw future juries from this panel.

26. On November 8, 1989, Respondent was again at the Windsor District Court, this time for the purpose of drawing a jury in the case of State v. White. At 1 pm a court officer observed respondent sitting in the back of the the court room, speaking with juror Donald Devereaux.

27. The court officer gestured to the Respondent to stop talking and move away, telling him that his conduct was a "no". Respondent continued to speak to juror Devereaux as he moved to the front of the court room and advised the court officer that Mr. Devereaux was an old client of his.

28. Approximately 25 minutes later, respondent was standing outside of the court house when he approached another juror, one Daniel Lackey. Juror Lackey had been a member of the jury which had acquitted respondent's other client on November 6th. Juror Lackey was a member of the panel from which Respondent was scheduled to draw a jury that afternoon. Respondent asked Juror Lackey how the legal system might be improved.

29. Two deputies to the State's Attorney observed Respondent

speaking with the jury panel member.

30. Respondent did not advise the court of any of these contacts with jurors prior to beginning of jury draw in the Case of State v. White.

31. At the bench, during voir dire and while exercising challenges, Deputy State's Attorney Joanne Baltz advised the court that she had observed Respondent in conversation with Juror Lackey. At that point Respondent stated that he had been "making small talk" with the juror.

32. The Deputy State's Attorney asked the court to strike Juror Lackey for cause because of this direct, ex Parte communication. The court denied that request, requiring the prosecutor to use a peremptory challenge to strike Juror Lackey.

33. At no time did Respondent advise opposing counsel or the court that he had also been conversing with Juror Devereaux prior to beginning of the draw. Juror Devereaux was not challenged by either party and became a member of the jury. Had the prosecutor been aware of the communication between Juror Devereaux and Respondent she would have challenged Juror Devereaux's service on the jury.

34. The jury returned a verdict in favor of Respondent's client.

35. Although Respondent claimed at the hearing that he did not know that it is forbidden for attorneys to communicate directly with members of the jury panel, the Board here adopts the panel's finding that Respondent's testimony in this regard was not credible. Respondent is a bright, well-educated attorney who passed exams in ethics in order to be admitted to the bar. It is a fundamental principle of litigation that members of a jury are to be impartial and that any ex parte communication with persons who might serve on a jury are prohibited. At the very least, Respondent acted recklessly in failing to determine whether it was proper to engage in communications with members of the jury panel. Respondent's efforts to ingratiate himself with members of the jury panel could have interfered with the outcome of the legal proceedings. Any communication with a member of a jury panel may have an impact on persons who must be impartial triers of fact. The ex parte nature of Respondent's communication, however innocuous the substance of the conversation, constitutes professional misconduct. Respondent violated his duty to refrain from communicating with members of a jury panel and violated his obligation to report such communication to the presiding judge.

36. The Board finds that Respondent was not encouraged by the trial court to report the other ex parte communications. The court expressed little concern for this ethical violation when it was brought to its attention by the prosecutor. The court did not comment upon the misconduct nor indicate to Respondent in any way that such ex parte communication is unethical. The court did not inquire of the prospective jurors as to what occurred nor did it grant the prosecutor's request that the juror be struck for cause. The Board finds that the court's attitude toward the misconduct reinforced Respondent's belief that such ex parte communication was not inappropriate.

RECOMMENDATIONS AS TO IMPOSITION OF SANCTIONS

The purpose of lawyer disciplinary proceedings is to protect the

public and the administration of justice from lawyers who have not discharged, will not discharge, or are unlikely properly to discharge their professional duties to clients, the public, the legal system, and the legal profession. In determining what sanction should be imposed, the Board considered the nature of the duty violated, the lawyer's mental state, the potential of actual injury caused by the lawyer's misconduct and the existence of aggravating or mitigating factors. Standard 3.0, ABA Standards for Imposing Lawyer Sanctions.

As to PCB File 89.51, Respondent violated his duty to the public to maintain the highest levels of person integrity. Canon 1, Code of Professional Responsibility. Lack of candor, dishonesty, and misrepresentations reflect adversely not only upon the Respondent's fitness to practice law. Such conduct also reflects adversely upon the profession as a whole and undermines the public's confidence of the integrity of members of the bar. While Mr. Kelley was injured by Respondent's lack of honesty, Respondent also injured the reputation of the bar.

Respondent also violated his duty to his client to avoid conflicts of interest by becoming personally embroiled in his client's legal difficulties. As to this violation, respondent acted negligently rather than knowingly. The Board has no information as to what actual harm resulted from this conflict, although the potential for harm is obvious.

In regard to PCB File 89.51, the Board recommends that the Supreme Court publicly reprimand Respondent in accordance with A.O. 9, Rule 7A(4). In making this recommendation, the Board has taken into consideration standards 4.33 and 5.13 of the ABA Standards for Imposing Lawyer Sanctions.

Aggravating factors taken into consideration include Respondent's lack of candor before the hearing panel. Mitigating factors taken into consideration include Respondent's subsequent acknowledgment of misconduct and the absence of a prior disciplinary record. The Board believes that Respondent has learned a great deal about his ethical responsibilities as a result of these proceedings and is confident that removal of Respondent from the practice of law is not necessary to protect the public from further misconduct.

In regard to PCB File 89.65, a more serious situation is presented. Respondent violated his duty owed to the legal system, acting recklessly if not knowingly. The potential for injury to the integrity of the administration of justice was great.

The aggravating and mitigating factors cited in the discussion of sanctions in Count 1 above are also applicable here. In addition, the Board is concerned that Respondent's previous attitude toward the ethicalness of his conduct may have been fostered, in some part, by the trial court's attitude in ignoring the infraction when it was brought to its attention. The Board is satisfied that Respondent now fully understands the gravity with which this Board views improper communications with the jury. The Board is persuaded that Respondent now accepts full responsibility for his conduct. His agreement to waive appellate review is a strong indication of that acceptance of responsibility.

The Board will follow Standard 6.3 but, in light of the circumstances presented, will not recommend that Respondent be suspended from the practice of law. In light of all of the circumstances set forth above, the

Board is confident that imposition of a public reprimand will be sufficient to protect the public and the profession from further misconduct while educating Respondent and other lawyers as to their duty to refrain from improper communication with prospective jurors. The Board, therefore, recommends to the Supreme Court that Respondent be publicly reprimanded.

Dated at Hartford, Vermont this 31st day of January, 1990.

/s/
Leslie Black, Esq.

/s/ 4-5-91
J. Eric Anderson, Esq.
Chair, Professional Conduct Board